COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS		**BOARD NOS. 089410-85** **040017-86** **072735-87**
Domingos Sardinha	Employee	**080123-00**
Woodman Corp.	Employer	**045542-02**
American Mutual/MIIF	Insurer	
Whaling Manufacturing Co. Inc.	Employer	
Western Employers Ins. Co./Guaranty Fund Mgmt. Serv.	Insurer	
American Insurance	Insurer	
AIM Mutual Insurance	Insurer	

REVIEWING BOARD DECISION
(Judges McCarthy, Carroll and Horan)

APPEARANCES
Michael A. Rudman, Esq., for the employee
Timothy F. Nevils, Esq., for American Mutual/MIIF
Robert Riccio, Esq., and Aaron Morrison, Esq., for Western Employers Ins. Co./ Guaranty Fund
Kathleen M. Greeley, Esq., for American Ins. Co.
Linda D. Oliveira, Esq., for AIM Mutual Ins. Co.

MCCARTHY, J. The employee appeals from an administrative judge's denial of his claim for workers' compensation benefits in this successive insurer case. The employee claimed various dates of aggravation injuries superimposed on accepted work injuries in 1985, 1986 and 1987. The employee appeals only as to one of the alleged aggravations, the lifting incident while working for Whaling Manufacturing ("employer") on August 31, 2000, when AIM Mutual Ins. Co. was on the risk. The employee argues that the judge did not make sufficient findings on whether a new injury occurred on that date, and erred by assigning an earning capacity equal to his last wage with the employer, prior to being laid off for non-medical reasons in 2002. We agree that recommittal is appropriate for further findings on the employee's post-layoff earning capacity.

The pertinent facts are these: The employee experienced three lower back injuries in short succession, the last of which resulted in the payment by American Ins. Co. of temporary total incapacity benefits from September 28, 1987 through January 21, 1988, and some partial incapacity benefits thereafter. Mr. Sardinha eventually returned to full-time work, and the employer accommodated the restrictions related to his continuing residual low back and left leg pain. (Dec. 11; August 27, 2003 Tr. hereinafter referred to as ["Tr. I"] 31-32, 110-112.)

The employee experienced an aggravation of his back and leg pain when he lifted a pile of coats on August 31, 2000, but did not leave work. The employee reported the incident, and the employer further modified the employee's duties to include pushing only one trolley at a time, performing light work such as belt patching, checking and cleaning coats, and
operating the automatic bagging machine. The employee continued working light duty until he was laid off on February 1, 2002, for non-medical reasons. He then collected unemployment benefits while looking for work. (Dec. 11; Tr. I 32-36, 112-113.)

The employee attempted work at four other establishments during 2002, all without success due to his continuing back impairment. At the hearing the employee's back and left leg pain were the same as when he had been laid off on February 1, 2002. The employee felt that he could perform light duty work full-time, as he was used to working in pain. (Dec. 12.)

The judge found,

> that the employee was able to earn $583.00 per week working for [the employer] through February 2002 when he was laid off. I find that the restrictions on [the] employee's physical activities have not changed since he was laid off. I find that [the] employee has received periods of unemployment benefits since the layoff and attempted to work at various jobs that he was unable to continue to perform as they were too physically demanding. . . . I find that the employee continues to be capable of performing light work similar to the job he had at the time of the layoff; that he can work full-time; and that he can earn an equivalent average weekly wage. I do not find that the employee has suffered a decreased earning capacity as a result of his work-related injuries.

(Dec. 14.) The judge denied the employee's claim for workers' compensation benefits commencing on June 19, 2002, concluding the employee had experienced only an episode of exacerbation – not a new injury – while working on August 31, 2000.[1] (Dec. 15.)

The employee argues that the judge's findings on his capacity to earn were arbitrary and capricious, because his earnings with the employer after August 31, 2000 were not applicable to the general labor market, and were simply paid through the "beneficence of the employer." (Employee Brief, 4.) We agree that the judge must make findings as to this aspect of the employee's vocational profile, based on our decision in Bradley v. Commonwealth Gas Co., 13 Mass. Workers' Comp. Rep. 142 (1999), *aff'd* Bradley's Case, 56 Mass. App. Ct. 359 (2002).

In Bradley, we concluded that an employee who earned an artificially inflated wage performing light duty does not, as a matter of law, have an earning capacity of that amount in the general labor market following a layoff. Id. at 146. We therefore affirmed the judge's findings to that effect:

> The judge determined that [for him] to find [as fact] a filing job available in the general labor market paying more than $23.00 per hour would be erroneous, as such wages were an anomaly, in the nature of a gratuity and, therefore, should have no impact on the analysis of earning capacity. (Dec. 11-12.) The judge found that there was no other job in the general market that would have provided the employee with such a wage for performing the work involved. (Dec. 11.) We reject the self-insurer's challenge to those factual assessments.

[1] There is no error in the judge's findings and conclusion that no new injury occurred on August 31, 2000. The judge's use of the word, "aggravation," (Dec. 11), "does not automatically delineate that a later insurer is liable for incapacity." Broughton v. Guardian Indus., 9 Mass. Workers' Comp. Rep. 561, 564 (1995), citing Thompson v. Tambrands, Inc., 9 Mass. Workers' Comp. Rep. 282 (1995). Where an employee has continual complaints related to his industrial injury after returning to work, such as here, an administrative judge's conclusion that a later incident was a recurrence of that injury, rather than a new injury, is commonly sustained. See Rock's Case, 323 Mass. 428, 429-430 (1948); Broughton, supra. We note, however, that under § 35B, the distinction between a new injury and a recurrence is of lesser importance, as the average weekly wage and rates of compensation are adjusted to the date of the later incident, the "subsequent injury," in any event. See Taylor's Case, 44 Mass. App. Ct. 495 (1998).

Id. The Bradley opinion went on to address the issue of the interplay between weekly benefit entitlement and layoffs. We concluded, based on a plethora of case law, that a layoff (analogous to the lockout in Bradley) did not bar an award of compensation based on an earning capacity that was lower than pre-layoff wages. Summarizing that precedent, we reasoned:

> The common threads running through these cases and the present case are clear: The judges all found that the respective employees suffered continuing incapacities related to their industrial injuries, even though they returned to some type of work prior to leaving again for non-medical reasons. Moreover, the fact that employees earned as much in light duty jobs as they did performing full duty before their injuries did not bar findings of lower earning capacities when those light duty jobs ended or were threatened.

Id. at 149. "It is recognized that postinjury earnings may be an unreliable basis for determining earning capacity." Bradley's Case, 56 Mass. App. Ct. at 364, citing Johnson's Case, 242 Mass. 489, 492 (1929). Finally, we noted that § 35D(1) did not apply to mandate the actual earnings of $23.00 per hour be used for calculation of earning capacity, as the employee no longer had those actual earnings from the discontinued employment. Moreover, under § 35D(3) and with § 35D(5), the $23.00 per hour job was not "a particular suitable job" for the purposes of establishing earning capacity, because the job was no longer "available." Id. at 149-150. The Appeals Court endorsed the reasoning of the administrative judge, and the reviewing board in Bradley's Case, supra at 363-364 and 367 n.9.

We consider that the employee's argument in the present case rightly invokes the principles discussed in Bradley. Even though Bradley was an affirmance of the judge's fact finding, we consider recommittal appropriate here for the judge to determine whether the wages paid to the employee during his highly modified duty post-August 31, 2000 until his layoff – which wages were unchanged from those earned doing more onerous tasks prior to that incident – accurately represented the employee's earning capacity in the general labor market post layoff.

Accordingly, we recommit the case for further findings consistent with this opinion.

So ordered.

_____
William A. McCarthy
Administrative Law Judge

Filed: ***January 12, 2005***

_____
Martine Carroll
Administrative Law Judge

_____
Mark D. Horan
Administrative Law Judge